(2)

No. 04-1280

Supreme Court, U.S.
FILED
APR 2 5 2005
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

LAKESIDE EQUIPMENT CORPORATION,
A DELAWARE CORPORATION,

*Petitioner,*

v.

THE TOWN OF CHESTER, A VERMONT
MUNICIPAL CORPORATION,

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The Supreme Court Of Vermont**

## BRIEF OF THE TOWN OF CHESTER IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

JAMES F. CARROLL
*Counsel of Record*
ENGLISH, CARROLL & RITTER, P.C.
64 Court Street
Middlebury, VT 05753
(802) 388-6711

*Counsel for Town of Chester*

April 25, 2005

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Has Petitioner established a compelling reason for certiorari review where the underlying case was decided using well established due process precedent and a fact specific application of state municipal agency law for which there exists no conflicting decisions amongst state courts of last resort or United States courts of appeal?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iv |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| A. Factual Background | 2 |
| B. Procedural Background | 5 |
| SUMMARY OF ARGUMENT FOR DENYING THE PETITION | 8 |
| ARGUMENT | 8 |
| A. The Vermont Supreme Court Applied this Court's Controlling Precedent in Determining that Chester Lacked the Minimum Contacts Necessary to Confer Personal Jurisdiction in Illinois | 9 |
| B. The Vermont Supreme Court's Determination that Illinois Lacked Personal Jurisdiction was Based upon Unique Facts as Applied to State Municipal Agency Law for Which There is no Dispute Among Circuit Courts of Appeal or State Courts of Last Resort | 13 |
| 1. Vermont courts properly applied principles of municipal agency law to the unique facts of this case in determining that Duquette's contacts with Lakeside could not be imputed to Chester | 14 |

TABLE OF CONTENTS – Continued

Page

2. Lakeside cites no cases which are in conflict with the decisions of the Vermont Supreme Court in *Lakeside I* and *Lakeside II* ..... 17

C. Chester did not Consent to Personal Jurisdiction in Illinois and Lakeside did not Preserve this Argument on Appeal ..... 18

1. The payment of an arbitration fee is not a consent to jurisdiction in Illinois, nor is it ratification of a contract ..... 18

2. Lakeside did not preserve its arguments regarding waiver and ratification on appeal ..... 20

CONCLUSION ..... 21

APPENDIX ..... App. 1

## TABLE OF AUTHORITIES

Page

CASES

*Allerion, Inc. v. Nueva Icacos, S.A. de C.V.*, 283 Ill.App.3d 40, 218 Ill.Dec. 632, 669 N.E.2d 1158 (1996) ..... 12

*Bosco v. Chicago Transit Authority*, 164 F.Supp.2d 1040 (N.D.Ill. 2001) ..... 15, 16

*Broadcast Music, Inc. v. M.T.S. Enterprises, Inc.*, 811 F.2d 278 (5th Cir. 1987) ..... 19

*Cactus Pipe & Supply Co., Inc. v. M/V Montmartre*, 756 F.2d 1103 (5th Cir. 1985) ..... 19

*Chicago Food Management, Inc. v. City of Chicago*, 163 Ill.App.3d 638, 516 N.E.2d 880, 114 Ill.Dec. 725 (Ill.App. 1987) ..... 16

*City of Norwalk v. Bd. of Labor Rel.*, 206 Conn. 449, 538 A.2d 694 (1998) ..... 15

*Cook v. Cook*, 342 U.S. 126, 72 S.Ct. 157, 96 L.Ed. 146 (1951) ..... 10

*D.C. Consulting Eng'rs, Inc. v. Batavia Park Dist.*, 143 Ill.App.3d 60, 97 Ill.Dec. 341, 492 N.E.2d 1000 (1986) ..... 16

*D.S.Am. (East) v. Elmendorf Grafica*, 274 Ill.App.3d 643, 211 Ill.Dec. 10, 654 N.E.2d 472 (1995) ..... 11, 12

*Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) ..... 10

*In re Johnston*, 145 Vt. 318, 488 A.2d 750 (1985) ..... 21

TABLE OF AUTHORITIES – Continued

Page

*International Medical Group, Inc. v. AAA*, 312 F.3d 833 (7th Cir. 2002) ..... 19

*International Shoe Company v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed 95 (1945) ..... 2, 9

*Lakeside Equipment Corp. v. Town of Chester*, 173 Vt. 317, 795 A.2d 1174 (2002) ..... *passim*

*Lakeside Equipment Corp. v. Town of Chester*, 2004 Vt. 84, 865 A.2d 422 (2004) ..... 14, 16, 17

*McMahon v. City of Chicago*, 339 Ill.App.3d 41, 789 N.E.2d 347, 273 Ill.Dec. 447 (Ill. App. 2003) ..... 16

*Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir. 1996) ..... 10

*Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) ..... 21

*Monks v. New Jersey*, 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed.2d 54 (1970) ..... 21

*Neirbo Co. v. Bethlehem Ship Building Corp.*, 308 U.S. 165 (1939) ..... 19

*Pavey Envelope & Tag Corp. v. Diamond Envelope Corp.*, 271 Ill.App.3d 808, 208 Ill.Dec. 193, 648 N.E.2d 1115 (1995) ..... 11

*Purdue Research Foundation v. Sanofi-Synthelabo*, 338 F.3d 773 (7th Cir. 2003) ..... 11, 13

*Sinclair v. Town of Bow*, 125 N.H. 388, 480 A.2d 173 (1984) ..... 15

*Sunbank of Ocala v. Pelican Homestead & Savings Assoc.*, 874 F.2d 274 (5th Cir. 1989) ..... 19

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND OTHER AUTHORITIES CITED

F.R.C.P. 12(h) ..... 18, 20

*Restatement (Second) of Agency*, §27 (1958) ..... 14, 17

U.S.Const., Amend. XIV §1 ..... 1

U.S. Sup. Ct. Rule 10 ..... 9

10 *T. Evans & J. O'Gallagher, McQuillen Mun. Corp.*, §29.04, 249 (3d.Ed. 1999) ..... 15

65 I.L.C.S. 5/8 – 10-21 ..... 16

735 I.L.C.S. 5/2 – 209(a)(7) ..... 1, 11

735 I.L.C.S. 5/2 – 209(c) ..... 1

24 V.S.A. §872 ..... 2

24 V.S.A. §1236(3) ..... 2, 15

28 U.S.C. §1257(a) ..... 8

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of the following constitutional and statutory provisions:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.Const., Amend. XIV §1.

> (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:
>
> (7) the making or performance of any contract or promise substantially connected with this State. . . .
>
> (c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

735 I.L.C.S. 5/2 – 209(a)(7) and (c).

## STATEMENT OF THE CASE

### A. Factual Background

This case involves Petitioner Lakeside Equipment Corporation's efforts to domesticate an Illinois judgment in Vermont. This judgment was issued without the requisite minimal contacts necessary to satisfy the requirements of due process under the Fourteenth Amendment of the United States Constitution and in derogation of "traditional notions of fair play and substantial justice." *International Shoe Company v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed 95 (1945).

Lakeside Equipment Corporation (hereinafter "Lakeside") is a Delaware corporation with its principal place of business in Bartlett, Illinois. Petitioner's Appendix (hereinafter referred to as "APP") at 67. Lakeside designs, fabricates and delivers equipment for wastewater treatment plants. APP 38.

The Town of Chester (hereinafter "Chester" or "Town") is a municipal corporation organized under the laws of the State of Vermont. APP 6-7. Chester is governed by its Board of Selectmen which has "general supervision of the affairs of the town" and the duty to perform "all duties required of towns . . . not committed by law to the care of any particular officer." 24 V.S.A. §872; APP 11.

Susan Spaulding is Chester's Town Manager and Chief Purchasing Agent. 24 V.S.A. §1236(3); APP 11. As Town Manager, Spaulding oversees the Wastewater Treatment Department. APP 11. Each department prepares and submits an annual budget to Spaulding and the Selectboard for approval, which is then submitted to the voters for approval at its annual town meeting. APP 11.

Once approved, the Selectboard and Town Manager are authorized to make purchases within the annual budget. APP 11. In Chester, department heads are generally authorized, by unwritten policy, to make purchases within their respective budgets, including capital improvements, without prior approval of the Town Manager or the Selectboard up to $500.00. APP 11. Purchases exceeding $500.00 require the prior approval of the Town Manager. APP 11-12. Upon approval, a purchase order number is issued by the Town Manager in chronological order. APP 12.

Chester owns and operates a wastewater treatment plant. APP 11. David Duquette ("Duquette") was hired by Chester to operate the wastewater treatment plant in 1994. APP 13. From 1994 through 1996, Chester conducted a 20 year review of its wastewater treatment system with the aid of a local consulting engineer. APP 12. The engineer prepared and filed a report with the state regulatory agency which contained an evaluation of the plant and recommended improvements, including the purchase of replacement *parts* for a clarifier. APP 12. Chester began the process of obtaining quotes from equipment suppliers in order to identify the amount of funds necessary to effectuate repairs. APP 12-13.

Duquette assisted Chester's engineer in the preparation of the report and assessment of the treatment plant. APP 12-13. He also solicited numerous estimates from manufacturers, including Lakeside, to repair or replace parts at the treatment plant. APP 13. In March of 1996, the voters of Chester approved, for the 1996-1997 fiscal year, limited capital expenditures for the wastewater treatment plant in the amount of $9,100.00. APP 13. Despite this limited budgeting authority, and a specific

expense limitation of $300.00 previously placed on Duquette by Spaulding, Duquette placed a verbal order with Lakeside for two new replacement clarifiers totaling $40,092.00. APP 13. Duquette placed the order without informing Spaulding and without securing her approval as Chester's purchasing agent.[1]

On April 23, 1996, Lakeside itemized and confirmed the order in a letter to Duquette. APP 13, 80-82. Accompanying the letter was a document entitled "Conditions of Sale" which called for payment within 30 days, and "arbitration of any controversy or claim arising out of or relating to this contract." APP 83-84. This was the first and only order Lakeside ever received from Chester. APP 14. The equipment was delivered directly to Chester's wastewater treatment plant on June 24, 1996, and accepted by Duquette. APP 15. No approval for this order was ever obtained by Duquette and no purchase order was ever issued by Chester for the order. APP 15.

Spaulding's first knowledge of the purchase was in late July, 1996 after receipt of Lakeside's bill. APP 13-14. Lakeside contacted Spaulding in late July seeking payment at which point Spaulding indicated that payment would be made within a week. APP 2. On August 1, 1996, after examining the bill and meeting with the Selectboard,

---

[1] Duquette testified that Spaulding was informed of the Lakeside purchase and had authorized placement of the order. APP 14. Spaulding testified that she had never authorized or been informed of the purchase or the placement of the order by Duquette and further denied ever issuing a purchase order for that purpose. APP 14. Judge Cooke, sitting in the Windsor Superior Court, specifically found Spaulding's testimony to be credible. APP 14-15.

Spaulding sent written notification to Lakeside that Duquette had no authority to make the purchase and that the Selectboard was withholding approval for payment. APP 2 and 14; Chester Appendix at 1. On August 27, 1996, Spaulding confirmed with Lakeside that Chester would not purchase the materials. Chester Appendix at 2. The clarifiers have not been used by Chester and Lakeside refuses to take them back. APP 2.

In his communications with Chester, Mr. McBride, Lakeside's sales agent, dealt exclusively with Mr. Duquette. APP 64-66. Lakeside made no independent inquiry of Chester or any of its agents concerning Duquette. APP 15. Lakeside did not inquire as to Duquette's authority to make purchases or order capital equipment. APP 15. Nor did Lakeside verify Duquette's authority to place an order of this magnitude. APP 15. No Town officer ever confirmed with Lakeside that Duquette had authority to place the order in question, nor did any Town officer ratify the purchase after delivery. APP 15.

## B. Procedural Background

In November of 1996, Lakeside submitted its demand for payment to arbitration with the American Arbitration Association ("AAA"). APP 23. This submittal was, presumably, undertaken pursuant to the arbitration clause found in the Conditions of Sale attached to Lakeside's correspondence of April 23, 1996. APP 23. AAA acknowledged receipt of the demand for arbitration and informed Chester of the requested hearing locale in Chicago, Illinois. APP 23. Chester did not respond to AAA's notification or file any appearance, pleadings, briefs or other documents. APP 23. Chester did not attend or participate in a

June 24, 1997 hearing held before the arbitrator in Chicago. APP 23. On being billed, Chester did pay a fee assessed by the arbitrator. APP 23. Chester paid no other filing fees, expenses or costs. APP 77.

At the June 24, 1997 hearing, the arbitrator requested that the parties submit briefs regarding jurisdiction. Lakeside submitted a brief but Chester did not. APP 23. On August 25, 1997, the arbitrator issued an award in favor of Lakeside in the amount of $50,890.06. APP 23 and 76. Subsequently, Lakeside petitioned for confirmation of the arbitration award in the Illinois Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois. APP 59. Chester did not respond to Lakeside's petition, nor did it appear in the Illinois Court proceeding. APP 23. On March 3, 1998, the Kane County Circuit Court issued its order granting Lakeside's Petition against the Town and entering judgment against Chester in the amount of $52,695.15. APP 23 and 74.

On March 31, 1998, Lakeside filed its Complaint to Domesticate and Enforce Foreign Judgment in the Windsor County Superior Court in the State of Vermont. APP 23 and 67. Chester filed its appearance and an answer and asserted a counterclaim challenging the validity of the underlying contract and the jurisdiction of the Illinois court to issue judgment. APP 23-24. The Windsor Superior Court granted summary judgment in favor of Lakeside, which was appealed to the Vermont Supreme Court. APP 36-58.

In *Lakeside Equipment Corp. v. Town of Chester*, 173 Vt. 317, 795 A.2d 1174 (2002) (hereinafter "*Lakeside I*"), the Vermont Supreme Court determined that Chester had not "waived its right to raise the jurisdictional issue in this proceeding to domesticate the Illinois judgment." *Lakeside*

*I*, 173 Vt. at 321, 795 A.2d at 1178; APP 25. The Court further found that Chester had not appeared in the Illinois proceeding and confirmed that a defendant "may defeat enforcement of [a] judgment in another forum by showing that the judgment was issued by a court lacking personal jurisdiction." *Id.* The Vermont Supreme Court then considered "whether the contacts made by the plant operator can be attributed to the Town so as to impose personal jurisdiction over the Town and otherwise bind the Town." *Lakeside I*, 173 Vt. at 322, 795 A.2d at 1179; APP 27. After finding an inadequate record on the issue, the Vermont Supreme Court reversed and remanded the case to determine whether there existed actual or apparent authority for Duquette's actions which were imputable to Chester or whether there was evidence establishing that Chester had ratified Lakeside's contract. *Lakeside I*, 173 Vt. at 326, 795 A.2d at 1182; APP 33.

On remand, the Windsor Superior Court took two days of testimony and issued its Findings, Opinion and Order concluding as follows:

> Judgment is for the Defendant, Town of Chester. The Court DECLARES that there never was a contract between Lakeside Equipment Corp. and the Town of Chester. The Court declines to enforce the judgment from the State of Illinois, based on lack of personal jurisdiction.

APP 10 and 19-20. Lakeside then appealed to the Vermont Supreme Court which unanimously affirmed the Windsor Superior Court's issuance of judgment in favor of Chester. APP 8. Lakeside filed its Motion to Reargue on October 1, 2004, which was denied by Entry Order entered December

16, 2004. APP 62. Petitioner's Writ of Certiorari was then filed on March 14, 2005, and placed on this Court's docket on March 24, 2005.

## SUMMARY OF ARGUMENT FOR DENYING THE PETITION

Lakeside's Petition for Writ of Certiorari fails to set forth any compelling reasons upon which this Court should grant certiorari under U.S. Sup. Ct. Rule 10 or 28 U.S.C. §1257(a). In summary, certiorari review of this case is not warranted because: (a) the Vermont Supreme Court used longstanding due process precedent in finding that Illinois lacked personal jurisdiction over Chester; (b) the decision that Chester lacked sufficient contacts with Illinois to assert personal jurisdiction was necessarily based upon the application of unique facts to state municipal agency law for which there exists no dispute among circuit courts of appeal or state courts of last resort, and (c) Lakeside's argument that Chester accepted or consented to jurisdiction in Illinois was not properly preserved for appeal.

## ARGUMENT

There is little about this case, or how it came to be resolved, that could form the basis of an opinion on personal jurisdiction having broad application among federal or state courts. There is nothing about this case which presents a compelling reason to grant certiorari review given its unique factual underpinnings and the use

of broadly accepted federal legal principles established in *International Shoe Company v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Lakeside's Petition does not attempt to articulate why this Court is compelled to accept certiorari review. Instead, Lakeside has chosen to argue its belief that the Vermont Supreme Court has misapplied the facts to broad agency concepts. This approach is directly at odds with the admonition found in Rule 10 of the Supreme Court Rules, which states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Lakeside articulates two substantive reasons for granting certiorari review: First, it argues that Lakeside "accepted and waived objections to personal jurisdiction in Illinois" and ratified the underlying contract when it paid a fee assessed by an arbitrator sitting in Illinois. *Lakeside Petition* at 10-18. Second, Lakeside argues that the Vermont courts misapplied well established "principles of agency law" when it found that Duquette, Chester's sewer plant operator, did not possess the requisite apparent authority to contract with Lakeside on Chester's behalf. *Lakeside Petition* at 18-24. For the reasons stated below, neither reason justifies certiorari review.

### A. The Vermont Supreme Court Applied this Court's Controlling Precedent in Determining that Chester Lacked the Minimum Contacts Necessary to Confer Personal Jurisdiction in Illinois

Before addressing the substance of Lakeside's claimed errors, it is important to note that the Vermont Supreme

Court referenced and applied this Court's longstanding precedent in deciding that the Illinois judgment was not entitled to full faith and credit. While Lakeside chooses to label the case as a "transparent effort" to "circumvent the core constitutional requirement of full faith and credit," *Lakeside Petition* at 11, it is readily apparent from the Vermont Supreme Court's decisions that it gave effect to both the Full Faith and Credit and the Due Process Clauses of the United States Constitution by using the framework established by this Court in resolving the merits of the case.[2]

In *Lakeside Equipment Corp. v. Town of Chester*, 173 Vt. 317, 795 A.2d 1174 (2002) (hereinafter referred to as "*Lakeside I*"), the Vermont Supreme Court confirmed that "[a] sister-state judgment is normally 'entitled to full faith and credit in the absence of a showing that [the] court lacked jurisdiction or acted to deprive defendant of a reasonable opportunity to be heard.'" *Lakeside I*, 173 Vt. at 321, 795 A.2d at 1178 (citing *Cook v. Cook*, 342 U.S. 126,

---

[2] Lakeside has never attempted to establish personal jurisdiction by arguing that the Illinois courts enjoy a "general" as opposed to "specific" jurisdiction over Chester by virtue of Chester's general business contacts with Illinois. *See Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996) (distinguishing jurisdictional analysis between "general" and "specific" jurisdiction). In fact, there is no evidence suggesting that Chester had any continuous or systematic general business contacts with Illinois entities. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S.Ct. 1868, 1873, 80 L.Ed.2d 404 (1984). The focus of Lakeside's argument has always been limited to Duquette's specific contacts with Lakeside which resulted in Lakeside's shipment of clarifiers to Chester and its subsequent efforts to collect. Chester APP 14-16. Accordingly, the Vermont Supreme Court properly focused on Chester's specific contacts with Lakeside in determining whether personal jurisdiction was established. *Lakeside I*, 173 Vt. 317, 323, 795 A.2d at 1180.

128, 72 S.Ct. 157, 96 L.Ed. 146 (1951)). The Vermont Supreme Court also acknowledged that "'in determining jurisdiction, the foreign State's law, as limited by due process, controls.'" *Lakeside I*, 173 Vt. at 322, 795 A.2d at 1189 (citing *Pavey Envelope & Tag Corp. v. Diamond Envelope Corp.*, 271 Ill.App.3d 808, 208 Ill.Dec. 193, 648 N.E.2d 1115, 1117 (1995)).

The Vermont Supreme Court went on to acknowledge the Illinois long-arm statute, *see* 735 I.L.C.S. 5/2 – 209(a)(7) and (c), and determined that the Illinois courts are statutorily authorized to exercise jurisdiction "on any . . . basis permitted under the Constitutions of Illinois and the United States." *Lakeside I*, 173 Vt. at 323, 795 A.2d at 1179. "[T]he question becomes whether the Court's exercise of jurisdiction comports with federal due process." *Id.* (citing *D.S.Am. (East) v. Elmendorf Grafica*, 274 Ill.App.3d 643, 211 Ill.Dec. 10, 654 N.E.2d 472, 478 (1995)).

After determining that Chester had not waived its right to raise a jurisdictional defense due to its non-appearance in Illinois, *Lakeside I*, 173 Vt. at 321-322, 795 A.2d at 1178-1179, the Vermont Supreme Court then engaged in the federal due process analysis articulated by the Illinois Supreme Court in *Elmendorf Grafica*.[3]

> Federal due process is satisfied when the defendant's contacts with the foreign state make it reasonable for the defendant to anticipate being

[3] The two tiered approach of reviewing a state's statutory authority pursuant to its long-arm statute before embarking on the due process analysis is entirely consistent with the approach taken within the State of Illinois. *See Purdue Research Foundation v. Sanofi-Synthelabo*, 338 F.3d 773, 779 (7th Cir. 2003) and *D.S.Am. (East) v. Elemendorf Grafica*, 247 Ill.App.3d 643, 211 Ill.Dec. 10, 654 N.E.2d 472, 478 (1995).

> hauled into court in that jurisdiction. The principle factors to be considered are (1) whether the nonresident defendant has had minimum contacts with the forum state so that there was fair warning that the defendant might have to defend a lawsuit there; (2) whether the action arose out of the defendant's contacts with the forum state; and (3) whether it is reasonable for the defendant to litigate in the forum state.

*Lakeside I*, 173 Vt. at 323, 795 A.2d at 1179 (citing *Elemendorf Grafica*, 654 N.E.2d 472, 478 (1995)). The Vermont Supreme Court acknowledged that in Illinois "a single business transaction may constitute sufficient minimum contacts to confer personal jurisdiction over a non-resident defendant." *Id.* (citing, *Allerion, Inc. v. Nueva Icacos, S.A. de C.V.*, 283 Ill.App.3d 40, 218 Ill.Dec. 632, 669 N.E.2d 1158, 1163-64 (1996)). "Under this analysis, the exercise of personal jurisdiction over a nonresident buyer is justified where the buyer initiated a transaction calling for specially ordered merchandise." *Id.* Finally, the Vermont Supreme Court acknowledged that "'[t]he due process clause permits personal jurisdiction to be exercised over a defendant based upon acts of its agent.'" *Id.* at 324. The ultimate question, however, as framed in *Lakeside I*, was whether Duquette's contacts with Lakeside may be imputed to the Town pursuant to his apparent authority.[4] *Lakeside I*, 173 Vt. at 324, 795 A.2d at 1180.

Lakeside has not challenged the Vermont Supreme Court's use of the above cited precedent or its analytical

---

[4] Lakeside has not disputed that Duquette did not have actual authority to enter into the contract. *Lakeside I*, 173 Vt. at 324-325, 795 A.2d at 1180.

framework. Nor has it challenged the proposition that an assessment of specific jurisdiction in this case requires a determination of "whether Duquette's conduct in ordering $40,000.00 in equipment from Lakeside may be imputed to the Town." *Lakeside I*, 173 Vt. at 324, 795 A.2d at 1180. Indeed, similar imputation issues have moved Illinois federal courts to undergo a similar analysis to the same effect. *See Purdue Research Foundation v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 784-785 (7th Cir. 2003) (holding that conduct of assignor, given the facts, could not be imputed to assignee for purposes of establishing personal jurisdiction over assignee). Instead, Lakeside chooses to attack the Vermont courts' findings and conclusions on the agency issue.

### B. The Vermont Supreme Court's Determination that Illinois Lacked Personal Jurisdiction was Based Upon Unique Facts as Applied to State Municipal Agency Law for Which There is no Dispute Among Circuit Courts of Appeal or State Courts of Last Resort

Lakeside seeks a reversal of the Vermont courts' substantive determination that Duquette, as Chester's sewer plant operator, had no apparent authority to contract with Lakeside and thereby establish the requisite contact necessary for jurisdiction. In doing so, it urges on this Court a re-working of the facts and the adoption of erroneous legal agency standards.

### 1. Vermont courts properly applied principles of municipal agency law to the unique facts of this case in determining that Duquette's contacts with Lakeside could not be imputed to Chester

The Vermont Supreme court properly remanded this matter in *Lakeside I* for an assessment of the material issues concerning Mr. Duquette's authority and ability to contract on behalf of the Town of Chester. APP 10-20. After assessing the documented evidence presented to it and assessing the credibility of the witnesses at trial, Judge Cook, sitting in the Windsor Superior Court, clearly and affirmatively determined that the facts presented by Lakeside and Chester did not warrant imputation of Duquette's actions to Chester under theories of either actual, implied or apparent authority. APP 16-17. "The deficiency in Lakeside's argument is that it ignores the trial court's unchallenged findings supporting the conclusion that neither Spaulding nor any other town official authorized Duquette to purchase the clarifiers." *Lakeside Equipment Corp. v. Town of Chester*, 2004 Vt. 84, ¶5, 865 A.2d 422, 425 (2004) (hereinafter "*Lakeside II*").

Lakeside now persists in its argument that *apparent* authority was conferred upon Duquette as a result of his activities in upgrading the treatment facility. *Lakeside Petition* at 22-24. In Lakeside's effort to give legal significance to its version of the facts, it cites *Restatement (Second) of Agency*, §27 (1958) as the legal benchmark for determinations of apparent authority. *See Lakeside Petition* at 20.

In making this substantive argument, Lakeside asks this Court to utilize legal standards in a manner which is inconsistent with municipal agency law currently employed in the states of Illinois and Vermont. As accurately stated in *Lakeside I*, the perimeters of agency law "'are sharply circumscribed when the principal is a municipal corporation.'" *Lakeside I*, 173 Vt. at 325, 795 A.2d at 1181 (citing *City of Norwalk v. Bd. of Labor Rel.*, 206 Conn. 449, 538 A.2d 694, 696 (1998)). "The general rule is that parties who contract with municipal corporations are bound to take notice of the power of a particular person or agency to make the contract." *Id.* (citing 10 *T. Evans & J. O'Gallagher, McQuillen Mun. Corp.* §29.04, at 249 (3d. Ed. 1999)). *See also*, *Sinclair v. Town of Bow*, 125 N.H. 388, 480 A.2d 173, 176 (1984) (rule that anyone dealing with agent of municipality is obligated to ascertain extent of agent's authority effectively excludes municipalities having doctrine of apparent authority applied against them, except to prevent unjust enrichment or manifest injustice). In Vermont, municipal purchasing authority is specifically delegated to the town manager. 24 V.S.A. §1236(3).

These are rules with which Lakeside, a corporation doing business in Illinois, should be familiar. "[U]nder Illinois law, '[i]t is the general rule that when the legislature grants to a municipal corporation power to do any act and prescribes the manner in which the power shall be exercised, the power must be exercised in the manner stated and not otherwise.'" *Bosco v. Chicago Transit Authority*, 164 F.Supp.2d 1040, 1054 (N.D.Ill. 2001). Further, "'when an employee of a municipal corporation purports to bind the corporation by contract without prior approval, in violation of an applicable statute, such a

contract is utterly void', and not merely voidable." *Id.* (citing *D.C. Consulting Eng'rs, Inc. v. Batavia Park Dist.*, 143 Ill.App.3d 60, 97 Ill.Dec. 341, 492 N.E.2d 1000, 1002 (1986) (holding contract void because park district superintendent was without authority to bind the park district in the absence of prior approval by park district board)). "A purchase order or contract that does not comply with the Illinois Municipal Code 'shall be null and void as to the municipality.'" *McMahon v. City of Chicago*, 339 Ill.App.3d 41, 789 N.E.2d 347, 350, 273 Ill.Dec. 447, 450 (Ill. App. 2003) (citing 65 I.L.C.S. 5/8 – 10-21). "A prospective contractor who deals with a municipal corporation is presumed to know the limitations of the power of the city officials to enter into contracts." *Id.* at 46, 789 N.E.2d at 350. In fact, under Illinois law, a "[p]laintiff's reliance on principals of delegation, apparent authority, implied authority, ratification and agency law is misplaced within the municipal law context." *Id.* at 48, 789 N.E.2d at 352.[5]

---

[5] Lakeside also argues that common law principles of equitable estoppel should prevent Chester from denying its obligation to pay under the contract. *See Lakeside Petition* at 24-26. In *Lakeside II*, this claim was specifically resolved contrary to Lakeside's position due to the lack of any evidence of knowledge by Chester of Duquette's purchasing activities. *Lakeside II*, 2004 Vt. 84, ¶8, 865 A.2d 422, 426. Further, a review of applicable Illinois law demonstrates that, similar to the law in Vermont, "ordinary principles of estoppel do not usually apply to public bodies." *Chicago Food Management, Inc. v. City of Chicago*, 163 Ill.App.3d 638, 645, 516 N.E.2d 880, 885, 114 Ill.Dec. 725, 730 (Ill.App. 1987).

> The general rule is that a city cannot be estopped by an act of its agent beyond the authority conferred upon him. It has been stated that anyone dealing with a governmental body takes the risk of having accurately ascertained that he who purports to act for it stays within the bounds of his authority, and that this is so even though the agent himself may have been unaware of the limitations upon his authority.

(Continued on following page)

Contrary to Lakeside's arguments, the Vermont courts properly analyzed the applicable state law on municipal agency to determine that Duquette's conduct in purchasing the clarifiers from Lakeside could not be imputed to Chester. This being the case, the Vermont Supreme Court properly determined that the minimum contacts requisite to the assertion of jurisdiction by the Kane County Circuit Court in Illinois was absent – thereby making its judgment order unenforceable in the State of Vermont.

### 2. Lakeside cites no cases that are in conflict with the decisions of the Vermont Supreme Court in *Lakeside I* and *Lakeside II*

Chester also notes that Lakeside's Petition completely fails to cite any case law issued by any United States circuit court of appeals or a state court of last resort which conflict with the holdings in *Lakeside I* or *Lakeside II* on the agency issue. In fact, a review of Lakeside's Petition in relation to its arguments on agency fails to disclose a single court citation whatsoever. Instead, Lakeside relies entirely on references to the Vermont Supreme Court's underlying opinions in *Lakeside I* and *Lakeside II* and references to various provisions of the *Restatement (Second) of Agency* (1958) in support of its view that vague and general principles of agency law dictate a contrary result. This view, as explained above, is factually and legally erroneous and is, as demonstrated by the absence of relevant citations, not shared by any other court. Accordingly,

---

*Id.* Accordingly, the Vermont Supreme Court properly applied principles of estoppel in finding in favor of Chester. *Lakeside II*, 204 Vt. 84, ¶8, 865 A.2d 422, 426.

Lakeside has failed to articulate any conflict among courts requiring resolution by certiorari review.

### C. Chester did not Consent to Personal Jurisdiction in Illinois and Lakeside did not Preserve this Argument on Appeal

Lakeside's lead argument in its Petition is that "the Town accepted and waived objections to personal jurisdiction, and affirmed the existence of the contract, effecting [sic] ratification, when it submitted to the arbitration tribunal sitting in Illinois." *Lakeside Petition* at 11. In essence, Lakeside argues that Chester's payment to an Illinois arbitrator of his fee constituted an "appearance" which the Vermont Supreme Court "failed to give any legal affect [sic] to." *Lakeside Petition* at 11. As will be demonstrated below, this payment does not warrant the legal effect suggested by Lakeside and it was not, in any event, preserved by Lakeside on appeal.

#### 1. The payment of an arbitration fee is not a consent to jurisdiction in Illinois, nor is it ratification of a contract

Although difficult to divine, it appears that Lakeside is seeking to superimpose the waiver provisions found in F.R.C.P. 12(h) on arbitration proceedings by correlating the payment of an arbitrator's fee to the entry of a general appearance. Factually, this inference is completely at odds with the very specific findings of the Vermont courts that Chester never entered an appearance, raised a defense or made any contact whatsoever with the Illinois courts or other parties relating to the domestication proceeding. APP 23. In fact, the arbitration proceeding itself was

initiated by Lakeside pursuant to an arbitration clause unilaterally imposed in a purchase contract which was never agreed to by any duly authorized agent of Chester. APP 23. The contractual question of whether a matter is jurisdictionally suitable for arbitration is an issue for courts, not the arbitrator. *International Medical Group, Inc. v. AAA*, 312 F.3d 833, 842 (7th Cir. 2002). It is highly questionable that an arbitrator, through his billing practices, can conclusively impose a court's jurisdiction over an unsuspecting litigant even if it were contractually provided by agreement. Here, however, there is nothing in AAA's Rules of Arbitration that suggests the preclusive effect advanced by Lakeside. Chester APP 3.

Lakeside has failed to provide a reference to any case law, statute or rule of arbitration which establishes that payment of an arbitration fee conclusively precludes assertion of a defense based on jurisdiction. Instead, it cites a number of a cases which stand for the unremarkable proposition that the defense of personal jurisdiction "may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct." *Neirbo Co. v. Bethlehem Ship Building Corp.*, 308 U.S. 165, 168 (1939). *See also, Cactus Pipe & Supply Co., Inc. v. M/V Montmartre*, 756 F.2d 1103, 1110-1111 (5th Cir. 1985) (filing of claim by owner of vessel in foreign dispute subjects owner and vessel to jurisdiction); *Sunbank of Ocala v. Pelican Homestead & Savings Assoc.*, 874 F.2d 274, 276 (5th Cir. 1989) (filing of a motion to dismiss constitutes an appearance and attempt to contest suit) and *Broadcast Music, Inc v. M.T.S. Enterprises, Inc.*, 811 F.2d 278, 281 (5th Cir. 1987) (entry of appearance and participation in litigation by corporate attorney on behalf of shareholders constitutes consent to jurisdiction).

These cases speak, specifically, to consent and waiver of jurisdiction as referenced in F.R.C.P. 12(h), a rule which, by its terms, applies in proceedings pending before federal courts. By its own terms, F.R.C.P. 12(h) has no application to an arbitration proceeding, nor do the cited cases address waiver in an arbitration context. Simply put, there is no case cited by Lakeside which imposes the legal effect it demands.

### 2. Lakeside did not preserve its arguments regarding waiver and ratification on appeal

Lakeside's assertion of waiver and acceptance based on Chester's payment is being made for the first time in its Petition for Writ of Certiorari before this Court. Lakeside had multiple opportunities to raise and argue this point before both the Windsor Superior Court and the Vermont Supreme Court and failed on each of those occasions to do so. APP 1-58; Chester APP 4-22. While it is uncontested that Chester's payment to the arbitrator was part of the record at the trial, it was never presented as having the legal effect now advanced by Lakeside. Chester APP at 4-22. There is no reference in any of Lakeside's briefs filed before the Vermont Supreme Court that Chester's payment, in fact, constituted an "acceptance" of jurisdiction or constituted a waiver of any of Chester's rights to assert personal jurisdiction as a defense. Chester APP 4-22. In fact, the only waiver argument raised on appeal, and addressed by the Vermont Supreme Court in *Lakeside I*, was specifically related to Chester's failure to raise the jurisdictional issues in the Illinois proceedings. *Lakeside I*, 173 Vt. at 321-322, 795 A.2d at 1178-1179; APP 25-26; Chester APP 7-13.

"A claim will not be considered where it is raised for the first time on certiorari review and state courts have had no opportunity to pass on it." *Monks v. New Jersey*, 398 U.S. 71, 71, 90 S. Ct. 1563, 26 L.Ed.2d 54 (1970). The Vermont Supreme Court requires litigants to raise and preserve their issues on appeal. *See In re Johnston*, 145 Vt. 318, 321, 488 A.2d 750 (1985) ("Issues not raised below will not ordinarily be considered when presented for the first time on appeal."). Lakeside's failure to present what it now sees as a critical issue warranting certiorari review to the Vermont Supreme Court in conformance with state procedures is, in and of itself, grounds for denying review by this Court. *Michigan v. Tyler*, 436 U.S. 499, 512, n. 7, 98 S.Ct. 1942, 1951, 56 L.Ed.2d 486 (1978). Accordingly, Lakeside's effort to address the "waiver" and "acceptance" for the first time on certiorari review is procedurally defective.

## CONCLUSION

There being no compelling reason demonstrated by Petitioner Lakeside to grant certiorari review of this case, Chester respectfully requests that this Court deny Lakeside's Petition for Writ of Certiorari.

Respectfully submitted this 25th day of April, 2005.

ENGLISH, CARROLL & RITTER, P.C.
JAMES F. CARROLL, ESQUIRE
*Counsel for Town of Chester*
64 Court Street
Middlebury, VT 05753
(802) 388-6711
(802) 388-2111 (facsimile)

App. 1

TOWN CHESTER

Depot Street
P.O. Box 370
Chester, VT 05143

(802) 875-2173
Fax (802) 875-2237

August 1, 1996

Mr. Walter McBride, III
Lakeside Equipment Corporation
P.O. Box 8448
Bartlett, IL 60103

Dear Mr. McBride:

The Select Board reviewed your invoice of $40,092.00 for clarifier parts at their meeting last night and are withholding approval for payment.

David Duquette had no authority to negotiate such a purchase. Town policies do not permit purchases in excess of $500.00 without a purchase order. Secondly, with purchases of this magnitude, it is our policy to solicit bids or quotes from at least three firms.

We have employed an engineer to review the purchase to determine (a) whether we needed these parts and (b) whether the price is competitive. Depending on his evaluation, we may or may not be returning the materials to you. The review will take place during the following week with a report delivered by August 14.

Sincerely,

Susan S. Spaulding
Town Manager

SSS:gae

App. 2

TOWN OF CHESTER

Depot Street
P.O. Box 370
Chester, VT 05143

(802)875-2173
Fax (802) 875-2237

August 27, 1996

Mr. Walter McBride, III
Lakeside Equipment Corporation
P.O. Box 8448
Bartlett, IL 60103

Dear Mr. McBride:

At their meeting of August 21, 1996, the Selectboard reviewed their engineer's report regarding the clarifier parts you delivered to us. It was their decision not to purchase these materials and, therefore, they will be returned to you as soon as possible.

Sincerely,

Susan S. Spaulding
Town Manager

SSS:gae

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION RULES
As Amended and Effective on July 1, 1996

COMMERCIAL ARBITRATION RULES

50. **Neutral Arbitrator's Compensation**

Unless the parties agree otherwise, members of the National Panel of Commercial Arbitrators appointed as neutrals on cases administered under the Expedited Procedures with claims not exceeding $10,000, will customarily serve without compensation for the first day of service. Thereafter, arbitrators shall receive compensation as set forth herein.

Arbitrators shall charge a rate consistent with the arbitrator's stated rate of compensation, beginning with the first day of hearing in all cases with claims exceeding $10,000.

If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the Association and confirmed to the parties.

Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

51. **Deposits**

The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

App. 4

IN THE SUPREME COURT OF THE STATE OF VERMONT

LAKESIDE EQUIPMENT CORP.

VS.

TOWN OF CHESTER

SUPREME COURT DOCKET NO. 2000-575

Lakeside Equipment Corp., Appellee

On Appeal From The
Windsor Superior Court
Docket No. S153-4-98Wrcv

---

# APPELLEE'S BRIEF

---

Lakeside Equipment Corp.
By Its Attorney:
Patrick M. Ankuda, Esq.
Parker & Ankuda, P.C.
P.O. Box 519
Springfield, VT 05156
(802) 885-2582

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE LOWER COURT CORRECTLY DECIDED THAT THE TOWN IS PRECLUDED FROM RAISING THE ISSUE OF AGENCY AUTHORITY WHERE THE TOWN FAILED TO RAISE THAT ISSUE IN A TIMELY MANNER UNDER THE ARBITRATION ACT?

II. WHETHER THE LOWER COURT CORRECTLY FOUND THAT ILLINOIS HAD PERSONAL JURISDICTION OVER THE TOWN?

III. WHETHER THE COURT PROPERLY GRANTED LAKESIDE'S SECOND MOTION FOR SUMMARY JUDGMENT?

IV. WHETHER THE TOWN WAIVED ITS RIGHT TO CHALLENGE THE JUDGMENT WHEN IT FAILED TO OBJECT TO THE FORM OF JUDGMENT IN A TIMELY MANNER UNDER V.R.C.P. 58?

## I. TABLE OF CONTENTS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW ..... i

TABLE OF CONTENTS ..... ii

TABLE OF CASES, STATUTES & OTHER AUTHORITIES CITED ..... iii

STATEMENT OF THE CASE ..... 1

A. Subject of the Litigation ..... 1

B. Claims of the Parties ..... 1

**C. Facts of the Case and Proceedings Below** ..... 2

**ARGUMENT** ..... 9

**A. Standard of Review** ..... 9

**B. The Town Is Precluded From Raising The Issue Of Agency Authority By Its Failure To Raise That Issue In A Timely And Proper Manner Under The Arbitration Act** ..... 10

**C. The Lower Court Correctly Found That Illinois Had Personal Jurisdiction Over The Town** ..... 16

**D. The Lower Court Properly Granted Lakeside's Second Motion For Summary Judgment Under Rule 56** ..... 23

**E. The Town Waived Any Challenge To The Judgment Order When It Failed To Object To The Form Of Judgment In A Timely Manner Under V.R.C.P. 58** ..... 24

**CONCLUSION** ..... 25

* * *

B. The Town Is Precluded From Raising The Issue Of Agency Authority By Its Failure To Raise That Issue In A Timely And Proper Manner Under The Uniform Arbitration Act.

In its Counterclaim below and now in its Appeal before this Court, the Town collaterally attacks the Illinois Judgment claiming alleged lack of agent authority in the formation of the parties' Contract. In the first two parts of its argument on brief, the Town variously asserts, mostly without legal support, that its agent, David Duquette,

acting outside the scope of his authority when filing an Order with Lakeside. Appellant's Brief at 7-11. On that basis, the Town requests a ruling that no valid Contract ever existed between Lakeside and the Town and consequently, the Town need not pay for the equipment. *Id.*; P.C. at 115.

Thus, the Town attacks not only the Illinois Judgment but the Contract and Arbitration Award upon which that Judgment is based. Under the Uniform Arbitration Act as adopted in both Illinois and Vermont, the Town had to object to the validity of the Contract, challenge arbitrability and contest the Award in a pre-Arbitration action or in the Arbitration itself, or in the Illinois Court. In order to attack the Illinois Judgment on the basis of lack of agency authority, the Town needed to Appeal the Illinois Judgment in Illinois. A collateral attack upon that Judgment now is inappropriate. *See* 47 Am.Jur.2d *Judgments* Section 916. The Town made no challenge then and cannot do so now. In its Decision, the Lower Court so held and properly limited the Town's collateral attack to due process. P.C. at 19.

1. The Town Failed To Raise Its Purported Defenses In The Illinois Courts Under The Arbitration Act.

Like Vermont, Illinois has adopted the Uniform Arbitration Act. *See* 710 ILCS Act 5. Section 11 of the Act provides that "upon application of a party, the court shall confirm the [arbitration] award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award in which case the court shall proceed as provided in Section 12 and 13." 710 ILCS 5/11. That Statute clearly provides that the Court

should confirm the award unless a party responds to the award by asserting grounds to vacate, modify or correct it. *See Konicki v. Oak Brook Racquet Club, Inc.*, 441 N.E.2d 1333, 1335 (Ill.App.Ct. 1982).

Under Illinois law, the burden is on the party opposing confirmation to come forward and timely apply to vacate, modify or correct the award. 710 ILCS Sections 5/12, 5/13. Grounds to challenge an award are set forth in Section 12 and 13 of the Act. *See id.* The Act requires, however, that the party opposing the award apply to vacate, modify or correct the award within 90 days after delivery of a copy of the award, except in cases of corruption, fraud or "undue means." 710 ILCS 5/12(b), 5/13(a). The filing of a petition to confirm an award does not extend that 90-day period. *Konicki*, 441 N.E.2d at 1335-1336. Thus, under Illinois law, a party seeking review of an arbitration award must either file a petition in the Circuit Court within 90 days of the award pursuant to Sections 12 and 13 of the Uniform Arbitration Act, or raise the grounds upon which review is sought in answer to the other party's petition to confirm the award under Section 11 of the Uniform Arbitration Act. *See id.* at 1335. That position is also consistent with Vermont law.

Like Illinois, Vermont enacted the Vermont Arbitration Act (VAA) based upon the Uniform Arbitration Act. *See* 12 V.S.A. Section 5651-5681. Consistent with Section 11 of the Illinois Act, under the VAA, a Vermont court shall confirm an arbitration award unless it finds grounds to vacate or modify it. 12 V.S.A. Section 5676. The VAA sets out those grounds, thereby limiting judicial discretion. The VAA requires the party opposing confirmation to come forward and apply to vacate, modify or correct an award within 30 days after delivery of a copy of the award, except

also in cases of corruption, fraud or "undue means." 12 V.S.A. Sections 5677(c), 5678(a). The Vermont Supreme Court adopts a "policy to uphold arbitration whenever possible and to prevent arbitration being another layer in the litigation process." *Springfield Teachers Association v. Springfield School Directors*, 167 Vt. 180, 187 (1997). To that end, the trial court becomes "'an appellate tribunal with a limited scope of review.'" *Matzen Construction Company v. Leander Anderson Corp.*, 152 Vt. 174, 177 (1989) (quoting *Wayne Insulation Company v. Hex Corp.*, 534 A.2d 1279, 1281 (D.C. 1987)).

In *Springfield Teachers Association*, *supra*, the Vermont Supreme Court affirmed a lower court decision confirming an arbitration award. *Springfield Teachers*, 167 Vt. at 190. In that case, the parties arbitrated an employee grievance; the plaintiff obtained an award to be reinstated at his job with back pay. *Id.* at 182-183. When plaintiff moved to confirm the award under VAA Section 5676, the defendant, Board, raised affirmative defenses including lack of jurisdiction. *Id.* at 183-187. The Court concluded that such defenses were "more properly characterized as grounds for vacating the arbitration award." *Id.* at 187. The Court found that the defendant, Board, failed to move to vacate the award within 30 days after delivery in accordance with VAA Section 5677(c). *Id.* Accordingly, the Court held that a party cannot raise affirmative defenses to an application to confirm an arbitration award unless it does so within the 30 day time limit provided in Section 5677. *Id.* Furthermore, the Court concluded that the VAA does not except jurisdictional defenses from the time limit established in that statute. *Id.* at 190.

This Court's position is consistent with Illinois case law. Indeed, in that case, the Court looked to Illinois case

law to interpret Section 5677. *See id.* at 188 (citing *Mid-America Regional Bargaining Association v. Modern Builders Industrial Concrete Company*, 427 N.E.2d 1011 (Ill.App.Ct. 1981)). *See also Joder Building Corp. v. Lewis*, 153 Vt. 115, 121 (1989).

In this proceeding to domesticate the Illinois Judgment confirming the Arbitration Award, the Town, through its Counterclaim, seeks to vacate the Arbitration Award. Like the Defendant, Board, in *Springfield Teachers Association*, the Town, is too late. The Town is two steps removed from its proper venue – the Arbitration proceeding – and untimely under Illinois' Uniform Arbitration Act. 710 ILCS 5/12. In fact, the AAA served the Arbitration Award upon the Town, on August 27, 1997. The Town did nothing. It failed to file a Motion To Vacate in Illinois within 90 days thereafter. The Town did not file a Motion in Vermont within 30 days thereafter. Interestingly enough, the Town alleged no procedural defects regarding the conduct of the Arbitration. Thus, it cannot now seek to do so.

The Defendant, Town's claim is just the type of case decried by this Court.

> "[O]ur policy is to uphold arbitration awards whenever possible and to prevent arbitration becoming another layer in the litigation process. The short period allowed by statute for challenging an award implements this purpose. We would undermine the statutory purpose, and the effectiveness of arbitration, if we held that a party who lost before the arbitrator could raise defenses at anytime in response to a motion to confirm. Indeed, the incentive would be to refuse to

> comply with the arbitration award and to raise defenses as late as possible."

*Springfield Teachers Association*, 167 Vt. at 187-88 (citations omitted).

2. The Town Waived The Agency Authority Defense By Failing To Raise It In the Arbitration.

In the context of Arbitration under the Uniform Arbitration Act, Vermont adopts a "waiver rule." A party must raise objections to arbitration and arbitrability of a claim in the Arbitration itself or waive any such defects. *See Joder Building Corp. v. Lewis*, 153 Vt. 115, 119-121 (1989). That party must raise "objections to arbitration jurisdiction . . . at the earliest possible moment to allow that issue to be addressed and resolved before the parties spend significant time and resources trying the case." *Id.* at 121.

The waiver rule serves the policy of arbitration as "an alternative dispute mechanism." *Id.* at 120. The rule requires a party "to contest the presence of a valid arbitration agreement early in the proceedings." *Id.* at 121.

In *Joder*, the Court affirmed a Vermont Judgment confirming an Arbitration Award despite claims by the Appellant in that case that the Arbitration was defective because no valid agreement existed. *Id.* at 123. Appellants there entered into an Arbitration Agreement that was statutorily invalid under the VAA. *Id.* at 118-119. When the Arbitrators would not grant a postponement of the Arbitration, the Appellants refused to attend. *Id.* at 117. The Arbitration went forward without the Appellants and an Award was entered. *Id.* at 117-118. When Plaintiff moved to confirm the Award in Superior Court, the Appellants

raised the validity issue for the firs [sic] time. *Id.* at 118. This Court rejected their claim on Appeal, holding that they participated sufficiently to justify a waiver. *Id.* at 122. The Court stated the refusal to appear at the Hearing was not an objection to Arbitration. *Id.* at 120.

Indeed, as the Court pointed out, citing Illinois case law, the Uniform Arbitration Act provides pre-arbitration procedures to address the issues of validity of an arbitration agreement and arbitrability of a claim. *Id.* at 121. Section 5674 of the VAA provides that an application to stay arbitration and on a showing that there is no agreement to arbitrate, the Court may stay a commenced or threatened arbitration proceeding. 12 V.S.A. Section 5674(b). If the Court finds no enforceable agreement to arbitrate, it shall order a stay. *Id.*

In the present case, there is no dispute of material fact regarding the Arbitration. The Town received notice of the Demand For Arbitration. *Id.* By letter dated December 18, 1996, the AAA noted the requested Hearing locale in Chicago and the Appointment of the Arbitrator, with a request for any objections. *Id.* The Town did not respond to that letter from the AAA. *Id.* The Town raised no defenses to the Arbitration in the Arbitration proceeding or in a pre-Arbitration proceeding. Despite notice and opportunity, it refused to attend the Arbitration. P.C. at 7. Furthermore, it participated to the extent of complying and paying its share of the costs of the Award. P.C. at 7. The Lower Court correctly concluded that the Town could not raise its defenses.

Despite its lack of compliance with the Arbitration Act, the Town tries to use other facts recited by the Court regarding its defenses to overcome its problem here.

Appellant's Brief at 7-8. The Town's argument only proves the point of *Joder*. The Town produced no evidence or objections until Lakeside sought to domesticate its Judgment her [sic] in Vermont. The Town ignored the Arbitration Act altogether, just as it ignored the UCC throughout the proceeding. As this Court pointed out in *Joder*, such conduct should not be rewarded. *Joder*, *supra* at 121-122. The Town only drove up the costs of this case, a result that the waiver rule seeks to prevent. This Court should not countenance such action, but instead affirm the Lower Court.

Moreover, the Town's collateral attack is not a proper one. The Town never appealed the Illinois Judgment. P.C. at 58. It cannot attack the merits of that Judgment here. *See* 47 Am.Jur.2d *Judgments* Sections 916, 928. This Court should so hold.

C. The Lower Court Correctly Held That Illinois Had Personal Jurisdiction Over the Town.

In its Brief, the Town repeats its collateral attack on the Illinois Judgment claiming lack of personal jurisdiction over it. Appellant's Brief at 12. Judgments of sister States are presumptively valid and entitled to "full faith and credit." *Hall v. McCormick*, 154 Vt. 592, 595 (1990); *Lueders v. Lueders*, 152 Vt. 171, 172 (1989). The Town bears the burden to overcome that presumption. *Driver v. Driver*, 148 Vt. 560, 562 FN.* 1987. The Town failed to meet that burden below and it fails to meet that burden here.

1. The Town Had Sufficient Minimum Contacts With Illinois That Relate To The Subject Of This Litigation To Entitle Illinois To A Certain Jurisdiction Over The Town.

The Town's principal attack on the Illinois Judgment is lack of personal jurisdiction. Yet, the Town offered little to the Lower Court to dispute assertion of jurisdiction over it. In its Brief here, it offers even less, relying principally on one distinguishable case and without reference to the Lower Court's extensive factual record. The Lower Court reviewed the facts material to the issue of personal jurisdiction and correctly decided that the Town had sufficient minimum contacts with Illinois to entitle Illinois to assert jurisdiction over the Town. P.C. at 16-19. This Court should affirm that Decision.

The Town's argument rests on the application of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Due Process Clause protects parties from being subject to Judgments of a State with which they have "no meaningful contacts." *Dall v. Kaylor*, 163 Vt. 274, 275 (1995). A State Court may assert jurisdiction over a non-resident Defendant and satisfy due process when that Defendant has "'certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

"Minimum contacts" have become the touchstone finding in jurisdictional analysis under the Due Process Clause. Since the time of *International Shoe*, the United States Supreme Court and this Court have refined that analysis to one critical question: "whether 'the defendant's conduct in connection with the forum state are such that

[the defendant] should reasonably anticipate being haled into Court there.'" *Id.* at 276 (quoting *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). The test of reasonableness is satisfied "when the Defendant purposefully directs activities toward residents of a forum state and the litigation arises out of, or relates to that activity." *Id.* The reasonableness test protects a Defendant from being haled into Court in a forum State based on "fortuitous, attenuated or random contacts." *Id.*

In the present case, the facts found by the Court for purposes of analysis were not contested. Those facts clearly established minimum contacts between the Town and Illinois. On or about April 15, 1996, Mr. Duquette, the Plant Operator of the Town's waste water facility contacted Lakeside in Illinois and placed a verbal order. P.C. at 4, 16. Lakeside acknowledged Mr. Duquette's Order in writing, itemizing the costs of the equipment ordered and including a form stating the Conditions of Sale. P.C. at 4, 16. The Town, through Mr. Duquette, supplied Lakeside with the Town's Purchase Order. P.C. at 4, 16. Lakeside designed the equipment, had it specially manufactured and shipped it to the Town on June 24, 1996. P.C. at 5,16. The Town acting again through Mr. Duquette received and accepted the equipment on June 27, 1996. P.C. at 5, 16. When the Town did not pay, Lakeside's Comptroller telephoned the Town of Chester to find out when payment would be sent and spoke with Chester Town Manager, Susan Spaulding. P.C. at 6, 16. Ms. Spaulding told Ms. Wolk that the check for payment of the Invoice would go out on July 31, 1996 which was one week later than the telephone call. P.C. at 6, 16. The Town paid nothing, but rather more than thirty days later, sent a notice to Lakeside saying that it refused to purchase the equipment

specifically manufactured for and delivered to it. P.C. at 6, 16-17.

The undisputed facts show that the Town intentionally initiated contact with Lakeside in Illinois by calling for a quote and then ordering the equipment. Out of those facts, this case arose. P.C. at 18.

The case relied upon by the Town, *Carothers v. Vogeler*, 148 Vt. 316 (1987), is distinguishable. In that case, a Vermont Defendant advertised a restored car once in a nationally circulated publication and sold it to the Ohio Plaintiff. *Id.* at 317. The seller was not in the business to sell cars. *Id.* More importantly for this analysis here, the Vermont Defendant appeared and presented his defense of lack of personal jurisdiction in Ohio to preserve that defense. *Id.* at 318. Here, the Town did nothing.

The Town was in the waste water treatment business. Unlike the Vermont Defendant in *Carothers*, the Town called Lakeside to place an Order; the Town purposefully directed its commercial activities at Illinois and Lakeside. Its reliance on *Carothers* is misplaced. The Lower Court correctly decided the matter. This Court should so hold.

2. The Town Is Precluded By The Waiver Rule From Raising The Issue Of Personal Jurisdiction

As discussed above, the Waiver Rule bars jurisdictional challenges not raised in arbitration first. *See* Section B.2. above. The facts are not in dispute. The Town did not raise the issue in Arbitration and preserve its claim. P.C. at 8. Compare *Carothers v. Vogeler*, 148 Vt. 316, 318 (1987) (Vermont Defendant appeared in Ohio litigation and raised jurisdictional defense to preserve it). Therefore,

the Town waived its right to do so later in litigation. Furthermore, under Illinois' Rules of Civil Procedure, a party may object to the Court's jurisdiction over the parties' person by filing a Motion to Dismiss the entire proceeding or any cause of action involved in the proceeding. 735 ILCS 5/2-301(a). The Town did nothing to preserve its jurisdictional defense in the Illinois Courts. *See Carothers, supra.*

3. The Defendant Town Consented To Jurisdiction In Illinois Because the Contract Contained An Arbitration Provision With Clauses For Choice Of Law And Jurisdiction That The Defendant, Town, Failed to Object To In A Timely Manner.

The Lower Court found that the parties entered into a contract under the UCC, a point ignored by the Town. P.C. at 18-19. The parties' contract, as contained in McBride's April 23, 1996 letter included an arbitration provision:

> "*ARBITRATION*: Any controversy or claim arising out of or relating to this contract or any modification thereof, shall be settled in Kane County, Illinois, by Arbitration in accordance with the laws of the State of Illinois, and the current Rules of the American Arbitration Association, and the parties consent to jurisdiction of the Circuit Court of the 16th Judicial Circuit, Kane County, State of Illinois, and further consent that any process or notice of motion or other application to such Court or Judge thereof may be served outside the State of Illinois by Registered Mail or by personal service, provided a reasonable time for appearance is allowed. Judgment upon the Award rendered by the Arbitrator may be entered in any Court having jurisdiction

> hereof, which shall include the County of arbitration."

P.C. at 6-7. That provision contained a forum selection clause that established personal jurisdiction and service for the Defendant, Town. *See id.* The parties waived personal jurisdiction defenses. The Defendant, Town, did not reject that term in a timely manner under the UCC. Therefore, the arbitration provision governs. UCC Section 2-201 *Off'l Comment* #2.

Personal jurisdiction is waivable; and the parties can easily contract to waive it. *RAR Inc. v. Turner Diesel Ltd.*, 107 F.3d 1272, 1280 (7th Cir. 1997). A forum selection provision like the one at issue in this case is "prima facie valid." *Richardson Engineering Company v. IBM*, 554 F.Supp. 467, 469 (D.Vt. 1981) (J. Coffrin). "It is now generally accepted that a choice of forum agreement of contracting parties controls absent a strong showing that it should be set aside." *Id.* at 468. A forum selection clause in a "freely negotiated" contract may be enforced without offending due process. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n. 14 (1985).

In the present case, the Town by failing to object to the terms of the contract in a timely manner pursuant to the UCC consented to personal jurisdiction in Illinois. Jurisdiction of the arbitration in Illinois was proper. The Town has no defense on that basis.

4. The Town Is Barred By Res Judicata From Raising The Issue Of Personal Jurisdiction When The Arbitration Addressed The Issue And The Town Did Not Timely Object.

As the undisputed facts clearly show in this case, the Arbitrator considered the issue of personal jurisdiction over the Town before rendering an award. P.C. at 8. In fact, the Arbitrator afforded the Town the opportunity to file its own brief regarding jurisdiction, but the Town chose to do nothing. *Id.* Based upon the parties' contract and its provisions, the Arbitrator entered his decision in favor of Lakeside. The issue of personal jurisdiction cannot be relitigated here. *See Springfield Teachers Association v. Springfield School Directors*, 167 Vt. 180, 190 (1997).

The judicial doctrine of *res judicata* bars relitigation of claims that were or might have been litigated in a previous action between the parties. *Agway, Inc. v. Gray*, 167 Vt. 313, 316 (1997). A final judgment bars a subsequent action where the parties and causes of action are identical. *Monmouth Public Schools, District No. 38 v. Pullen*, 489, N.E.2d 1100, 1106 (Ill.App.3d Dist. 1985). An arbitration award has the same preclusive force and effect as a Court Judgment. *Gray*, 167 Vt. at 316-17; *Pullen*, 489 N.E.2d at 1106. The Lower Court has also recognized that the *res judicata* effects from an arbitration proceeding are strong. P.C. at 59.

In *Springfield Teachers Association*, the Vermont Supreme Court held that a party may not raise affirmative defenses to an application to confirm an arbitration award unless it does so within the time limit for moving to vacate an arbitration award under the State's Arbitration Act. *Springfield Teachers Association*, 167 Vt. at 189. In that case, the Defendant, Springfield School Directors, challenged an

arbitration award more than 30 days after a motion to vacate the award would have been due. *See* 12 V.S.A. Section 5677(c). Once [sic] of the grounds on appeal was the lack of subject matter jurisdiction of the arbitrator. *Springfield Teachers Association*, 167 Vt. at 187, 189-190. The Vermont Supreme Court ultimately concluded that Section 5677 of the Vermont Arbitration Act requires that all jurisdictional challenges be raised within the statutory time limit for a motion to vacate. *Id.* at 190. As the Court made clear, "The usefulness of arbitration is undermined if issues can be withheld from the arbitrator and raised for the first time in court long after the arbitration is over." *Id.*

The Supreme Court's conclusion in *Springfield Teachers Association* has more force in this case. The *Springfield Teachers Association* case concerned a subject matter jurisdiction challenge. Subject matter jurisdiction is the one defense under the Rules of Civil Procedure that is usually not waived by the parties. *See* V.R.C.P. [sic] 12. Personal jurisdiction on the other hand, is waivable. *See RAR, Inc., supra*. In this case, the Town, by failing to object to the terms of the contract, waived personal jurisdiction. It also failed to timely raise the issue in a motion to vacate the award either in Illinois or in Vermont under the Uniform Arbitration Act. If subject matter jurisdiction can be waived by failure to follow the rules of the Uniform Arbitration Act then certainly personal jurisdiction, a clearly waivable defense, should also be waived. The *Springfield Teachers Association* holding should apply in this case and Judgment affirmed for Lakeside.

---

IN THE SUPREME COURT OF THE STATE OF VERMONT

LAKESIDE EQUIPMENT CORP.

VS.

TOWN OF CHESTER

SUPREME COURT DOCKET NO. 2003-193

Lakeside Equipment Corp., Appellant

On Appeal From The
Windsor Superior Court
Docket No. S153-4-98Wrcv

---

# APPELLANT'S BRIEF

---

Lakeside Equipment Corp.
By Its Attorney:
Patrick M. Ankuda, Esq.
Parker & Ankuda, P.C.
P.O. Box 519
Springfield, VT 05156
(802) 885-2582

* * *

Section D. Claims of Error

I. THE LOWER COURT ERRED BY FAILING TO FIND THAT THE TOWN'S AGENT, DAVID DUQUETTE, HAD ACTUAL AUTHORITY TO ENTER INTO THE CONTRACT ON THE TOWN OF CHESTER'S BEHALF.

II. THE LOWER COURT ERRED BY FAILING TO FIND DUQUETTE HAD APPARENT AUTHORITY

TO ACT ON BEHALF OF THE TOWN IN PLACING AN ORDER WITH LAKESIDE EQUIPMENT.

III. THE LOWER COURT ERRED BY FAILING TO FIND THAT THE TOWN SHOULD BE ESTOPPED FROM DENYING DUQUETTE'S AUTHORITY IN THIS TRANSACTION.

IV. THE LOWER COURT ERRED BY FAILING TO TAKE INTO CONSIDERATION THAT UNDER THE UNIFORM COMMERCIAL CODE A VALID CONTRACT MAY BE FORMED BETWEEN MERCHANTS WITHOUT THE FORMAL REQUIREMENTS OF A CONTRACT.

* * *